

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

JASON PATRICK PERSHALL,

Petitioner,)
vs.) NO. CIV-09-67-D
DAVID C. MILLER, et al.,)
Respondents.)

ORDER

Petitioner, a state prisoner appearing *pro se*, brought this action for habeas corpus relief, and filed a motion for leave to proceed *in forma pauperis*. Pursuant to 28 U. S. C. § 636(b)(1)(B) and (C), the matter was referred to United States Magistrate Judge Bana Roberts for initial proceedings. As required by 28 U. S. C. § 1915, the Magistrate Judge reviewed the motion to proceed *in forma pauperis* and the supporting affidavit, which reflects that, at the time he filed this action, Petitioner had \$72.00 in his savings account. Accordingly, the Magistrate Judge determined that he had sufficient funds with which to prepay the filing fee of \$5.00.

In a Report and Recommendation [Doc. No. 5], the Magistrate Judge recommended that Petitioner's Motion [Doc. No. 2] be denied and that he be required to pay the \$5.00 fee within 20 days of any order adopting the Report and Recommendation. Because Petitioner timely objected to the Report and Recommendation, the matter is reviewed *de novo*.

The Court has reviewed the *in forma pauperis* application and accompanying affidavit. The Magistrate Judge was correct in noting that the affidavit reflects that Petitioner has \$72.00 in his savings account. In his objection to the Report and Recommendation, Petitioner states that he does not have sufficient funds to pay the \$5.00; he attaches two receipts, dated January 23, 2009, showing

a zero balance in an unidentified fund he maintains at the Lawton Correctional Facility, where he is incarcerated. He also attaches a one page document reflecting purchases of personal items and showing a zero balance. This fund is also not identified. Furthermore, the receipts submitted reflect balances on January 23, 2009 and January 26, 2009. This action was filed on January 15, 2009, and the affidavit submitted with Petitioner's Motion reflected the funds in his accounts on January 13, 2009, immediately prior to the filing of this action¹.

The documents and affidavit on which the Magistrate Judge relied reflect that, as of the date this action was filed, Petitioner had sufficient funds to pay the \$5.00 initial fee. Accordingly, the Court agrees that Petitioner's motion to proceed *in forma pauperis* should be, and is, DENIED. The Report and Recommendation [Doc. No. 5] is adopted. Petitioner is directed to pay the \$5.00 filing fee to the Clerk of the Court within twenty (20) days of the date of this Order. Failure to do so will result in the dismissal of this action without prejudice to the filing of a new case.

IT IS SO ORDERED this 9th day of February, 2009.



TIMOTHY D. DEGIUSTI
UNITED STATES DISTRICT JUDGE

¹Although he argues that he has no funds, Petitioner also asks the Court to order the Warden to release funds to Petitioner. That request is denied, as Petitioner must take the necessary action to seek release of the funds to pay the \$5.00 filing fee, and he may submit this Order to explain the purpose of his request.